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Message Text

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TO AMEMBASSY BRUSSELS
INFO SECDEF/GENERAL COUNSEL
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E.O. 11652: N/A

TAGS: MORG, CFED, BE

SUBJECT: TAX DIFFICULTIES WITH BELGIAN GOVERNMENT

REF: BRUSSEL 5944

PLEASE PASS ASST LEGAL ADVISER LOUIS G. FIELDS

1. FOLLOWING ARE POINTS WHICH MAY BE UTILIZED IN MEETING WITH AMBASSADOR VERWILGHEN ON JULY 11 TO REPLY TO BELGIAN NOTE QUOTED IN REFTEL.

2. THE BELGIAN MINISTRY STATES THAT IT CANNOT ENVISAGE
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APPLYING THE BELGO-AMERICAN MEMORANDUM OF MARCH 18 AND APRIL 7, 1952, (TIAS 2719) "INDIVIDUALLY" TO MEMBERS OF THE AMERICAN FORCES. NOTE THAT THE TAXES IN QUESTION ARE BEING ASSESSED AGAINST THE NATO/SHAPE SUPPORT GROUP (US)

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(NSSG) WHICH HAS ENTERED INTO LEASING ARRANGEMENTS WITH BELGIAN LANDLORDS FOR QUARTERS FOR AMERICAN MILITARY AND CIVILIAN PERSONNEL. THESE LEASED FACILITIES, WHICH ARE OF COURSE USED INDIVIDUALLY, ARE ENTERED INTO AND PAID BY THE USG FOR THE COMMON DEFENSE EFFORT. IT HAS LONG BEEN THE U.S. POSITION THAT ANY BURDEN IMPOSED BY ONE GOVERNMENT ON THE EXPENDITURES OF ANOTHER GOVERNMENT WHICH CONTRIBUTE TO THE COLLECTIVE DEFENSE EFFORT CONSTITUTES AN OBSTACLE

TO THE CONCEPT OF MUTUAL AID ON WHICH OUR COLLECTIVE DEFENSE EFFORT IS BASED. IT IS VERY DIFFICULT TO EXPLAIN TO THE AMERICAN PEOPLE, OR TO THEIR REPRESENTATIVES IN CONGRESS, THE PAYMENT OF TAXES TO OTHER GOVERNMENTS ON UNITED STATES EXPENDITURES WHICH CONTRIBUTE TO THE COMMON DEFENSE. THIS PRINCIPLE OF TAX EXEMPTION WAS EXPLICITLY RECOGNIZED IN THE OPENING PARAGRAPH OF TIAS 2719 IN THE BROADEST OF TERMS: "THE GOVERNMENT OF BELGIUM AGREES WITH THE PRINCIPLE THAT RELIEF FROM TAXES AND DUTIES WILL BE ACCORDED TO THE ABOVE EXPENDITURES...", I.E., "EQUIPMENT, MATERIALS, FACILITIES AND SERVICES FOR THE COMMON DEFENSE EFFORT, INCLUDING EXPENDITURES FOR ANY FOREIGN AID PROGRAM OF THE UNITED STATES."

3. SPECIFIC MENTION OF EXPENDITURES FOR HOUSING FOR U.S. MILITARY AND CIVILIAN PERSONNEL WAS NOT MADE IN TIAS 2719. HOWEVER, THE ADMINISTRATIVE PRACTICE INTERPRETING THIS AGREEMENT FOR MORE THAN 23 YEARS FIRMLY ESTABLISHES THAT SUCH TAXES WILL NOT BE ASSESSED. THE ONLY EXCEPTION FROM THE TAX EXEMPTION PROVIDED BY TIAS 2719 IS FOUND IN PARAGRAPH 4 WHICH SPEAKS OF "SMALL EXPENDITURES WHERE THERE IS NO FORMAL CONTRACT CONCLUDED BY A 'CONTRACTING AND PURCHASING OFFICER' OR OTHER OFFICIAL DULY DESIGNATED FOR THE PURPOSE OF CONCLUDING CONTRACTS BY THE GOVERNMENT OF THE UNITED STATES." THE GOB DOES NOT EVEN ATTEMPT TO USE THIS SOLE EXCEPTION AS A BASIS FOR ASSESSING THE USG AFTER THESE 23 YEARS.

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4. ARGUABLY THE NOTE CONTAINED IN THE REFTEL IS A REQUEST TO DISCUSS A TAX NOT MENTIONED IN THE AGREEMENT. SEE PARAGRAPH 5 OF TIAS 2719. EVEN UNDER SUCH AN INTERPRETATION, THE TAXES WHICH THE GOB WISHES TO ASSESS COME WITHIN THE PRINCIPLE OF COMPLETE EXEMPTION FOR "FACILITIES ...FOR THE COMMON DEFENSE EFFORT..." THUS, PURSUANT TO PARA 5 THE TWO GOVERNMENTS MUST NOW "UNDERTAKE TO ESTABLISH PROCEDURES FOR PROVIDING FOR THE GOVERNMENT OF THE UNITED STATES APPROPRIATE RELIEF SIMILAR TO THAT OUTLINED IN THIS MEMORANDUM." SUCH COULD BE PROVIDED BY THE AUTHORIZATIONS MENTIONED IN PARA 2. THE ONLY EXCEPTIONS WOULD BE "SMALL EXPENDITURES WHERE THERE IS

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NO FORMAL CONTRACT" AND CHARGES FOR SERVICES RENDERED, NOT TAXES ASSESSED TO RAISE REVENUES.

5. IF THE GOB SHOULD RAISE THE CONTENTION THAT EXPENDITURES FOR LODGING DO NOT CONSTITUTE EXPENDITURES FOR THE OFFICIAL USE OF U.S. FORCES UNDER PARAGRAPH 2 OF ARTICLE 42 OF THE BELGIAN TVA LAW, TWO REPLIES SEEM IN ORDER. FIRST, WE ARE INTERPRETING TIAS 2719, AND NOT THEIR INTERNAL LAW. TIAS 2719 BY ITS TERMS AND 23 YEARS OF

ADMINISTRATIVE INTERPRETATION HAS PROVIDED EXEMPTION FROM SUCH TAXES. THE INTERNAL LAW OF THE GOB CANNOT BE USED TO JUSTIFY ITS FAILURE TO PERFORM UNDER TIAS 2719. SEE ARGUMENT IN PARA 8 BELOW. PARAGRAPH 2 OF ARTICLE 42 READS AS FOLLOWS: THE EXEMPTION FROM THE TAX SHALL BE APPLICABLE TO THE FOLLOWING SUPPLIES AND IMPORTATIONS WHEN THEY TAKE PLACE UNDER THE CONDITIONS DETERMINED BY THE MINISTER OF FINANCE OR HIS DEPUTY... (3) SUPPLIES AND IMPORTATIONS OF GOODS AND SUPPLIES OF SERVICES EITHER FOR THE OFFICIAL USE OR THE FORCES OF FOREIGN STATES WHICH ARE PARTIES TO THE NORTH ATLANTIC TREATY OR THE CIVILIANS ACCOMPANYING THEM, OR FOR THE SUPPLY OF THEIR MESS OR CANTEEN...." SECOND, THE GOB IS ATTEMPTING TO ASSESS THESE TAXES DIRECTLY UPON THE CONTRACTUAL EXPENDITURES OF THE USG FOR NO LESS PURPOSE THAN THE LODGING OF ITS MILITARY AND ANCILLARY CIVILIAN PERSONNEL. THE LODGING OF SUCH PERSONNEL, WHETHER IN DESIGNATED ENCAMPMENTS OR IN OTHER MORE CIVILIAN SETTINGS, IS A VITAL OFFICIAL FUNCTION OF THE USG.

6. WITH REGARD THE ARGUMENT THAT MEMBERS OF THE FORCES AS INDIVIDUALS ARE SUBJECT TO THE FISCAL REGULATIONS OF THE STATE WHERE THEY ARE LOCATED IN MATTERS OF DUTIES OR TAXES APPLIED TO THE PURCHASE OF GOODS AND SERVICES PURSUANT TO PARAGRAPH 8 OF ARTICLE IX OF THE JUNE 19, 1951, LONDON CONVENTION (TIAS 2846), TWO REPLIES MAY BE MADE. FIRST, PARAGRAPH 7 OF TIAS 2719 SPECIFICALLY STATES THAT THE LONDON CONVENTION IS NOT INTENDED TO "AFFECT THE UNDERSTANDINGS CONTAINED IN THIS MEMORANDUM." SECOND, PARAGRAPH 8 OF ARTICLE IX DOES NOT SUBJECT MEMBERS OF THE FORCES AS INDIVIDUALS TO TAXES BUT INSTEAD DOES NOT CREATE AN EXEMPTION: "NEITHER A FORCE, NOT A CIVILIAN COMPONENT, NOR THE MEMBERS THEREOF, NOR THEIR DEPENDENTS, SHALL BY REASON OF THIS ARTICLE ENJOY ANY EXEMPTION FROM TAXES OR DUTIES RELATING TO PURCHASES AND SERVICES CHARGEABLE UNDER THE FISCAL REGULATIONS OF THE RECEIVING STATE."

7. FYI: PARA 3 OF ARTICLE IX OF THE LONDON CONVENTION READS AS FOLLOWS: "SUBJECT TO AGREEMENTS ALREADY IN FORCE OR WHICH MAY HEREAFTER BE MADE BETWEEN THE AUTHORIZED

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REPRESENTATIVES OF THE SENDING AND RECEIVING STATES, THE AUTHORITIES OF THE RECEIVING STATE SHALL ASSUME SOLE RESPONSIBILITY FOR MAKING SUITABLE ARRANGEMENTS TO MAKE AVAILABLE TO A FORCE OR A CIVILIAN COMPONENT THE BUILDINGS AND GROUNDS WHICH IT REQUIRES, AS WELL AS FACILITIES AND SERVICES CONNECTED THEREWITH. THESE AGREEMENTS AND ARRANGEMENTS SHALL BE, AS FAR AS POSSIBLE, IN ACCORDANCE WITH THE REGULATIONS GOVERNING THE ACCOMMODATION AND BILLETING OF SIMILAR PERSONNEL OF THE RECEIVING STATE.

IN THE ABSENCE OF A SPECIFIC CONTRACT TO THE CONTRARY, THE LAWS OF THE RECEIVING STATE SHALL DETERMINE THE RIGHTS AND OBLIGATIONS ARISING OUT OF THE OCCUPATION OR USE OF THE BUILDINGS, GROUNDS, FACILITIES OR SERVICES." DID THE GOB PARTICIPATE OR IN ANY WAY ARRANGE FOR THE USG TO ENTER THE CONTRACTS IN QUESTION? DO THE CONTRACTS HAVE A CLAUSE DEALING WITH TAXES OR AUTHORIZATIONS FOR TAX EXEMPTION?

8. IF THE GOB SHOULD CONTEND THAT TIAS 2719 IS NOT
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BINDING BECAUSE IT WAS NOT PASSED BY THEIR PARLIAMENT, TWO RESPONSES ARE IN ORDER. FIRST, THE TREATY FILE FOR TIAS 2719 CONTAINS A TELEGRAM FROM THE U.S. EMBASSY IN BRUSSELS TO THE SECRETARY OF STATE SIGNED BY MILLARD AND DATED APRIL 9, 1952, READING IN PART AS FOLLOWS: "TAX AGREEMENT NOW (RPT NOW) FULLY IN FORCE, AND NO (RPT NO) PARLIA-MENTARY ACTION REQUIRED RE AGREEMENT." THIS SUGGESTS THAT THIS ISSUE WAS CONSIDERED AND DISPOSED OF AT THE TIME THE AGREEMENT WENT INTO FORCE. SECOND, THE VIENNA CONVENTION ON THE LAW OF TREATIES WHICH WAS SIGNED BY FORTY-SIX PARTIES INCLUDING THE USG BUT NOT THE GOB ON MAY 23, 1969, WHICH HAS NOT YET ENTERED INTO FORCE, BUT WHICH IS CONSIDERED TO BE AN AUTHORITATIVE GUIDE TO CURRENT TREATY LAW AND PRACTICE MAKES CLEAR THAT THE INTERNAL LAW OF THE GOB CANNOT BE INVOKED TO DEFEAT TIAS 2719. "ARTICLE 27: INTERNAL LAW AND OBSERVANCE OF TREATIES. A PARTY MAY NOT INVOKE THE PROVISIONS OF ITS INTERNAL LAW AS JUSTIFICATION FOR ITS FAILURE TO PERFORM A TREATY. THIS RULE IS WITHOUT PREJUDICE TO ARTICLE 46." "ARTICLE 46: PROVISIONS OF INTERNAL LAW REGARDING COMPETENCE TO CONCLUDE TREATIES. 1. A STATE MAY NOT INVOKE THE FACT THAT ITS CONSENT TO BE BOUND BY A TREATY HAS BEEN EXPRESSED IN VIOLATION OF A PROVISION OF ITS INTERNAL LAW REGARDING COMPETENCE TO CONCLUDE TREATIES AS INVALIDATING ITS CONSENT UNLESS THAT VIOLATION WAS MANIFEST AND CONCERNED A RULE OF ITS INTERNAL LAW OF FUNDAMENTAL IMPORTANCE. 2. A VIOLATION IS MANIFEST IF IT WOULD BE OBJECTIVELY EVIDENT TO ANY STATE CONDUCTING ITSELF IN THE MATTER IN ACCORDANCE WITH NORMAL PRACTICE

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AND IN GOOD FAITH." IN THAT THE LACK OF PARLIAMENTARY ACTION WOULD NOT BE A MANIFEST VIOLATION OF THE INTERNAL LAW OF THE GOB GIVEN THE STATEMENT IN THE MILLARD TELEGRAM OF APRIL 9, 1952, THERE DOES NOT APPEAR TO BE ANY GROUND FOR INVALIDATING THE TREATY AT THIS TIME.

9. IF THE GOB SHOULD SUGGEST THAT IT WISHES TO TERMINATE OR SUSPEND TIAS 2719, THE FOLLOWING PROVISIONS OF THE

VIENNA CONVENTION ON THE LAW OF TREATIES MAY BE CITED:
"ARTICLE 56: DENUNCIATION OF OR WITHDRAWAL FROM A TREATY CONTAINING NO PROVISION REGARDING TERMINATION, DENUNCIA-
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TION OR WITHDRAWAL. 1. A TREATY WHICH CONTAINS NO PROVISION REGARDING ITS TERMINATION AND WHICH DOES NOT PROVIDE FOR DENUNCIATION OR WITHDRAWAL IS NOT SUBJECT TO DENUNCIATION OR WITHDRAWAL UNLESS: (A) IT IS ESTABLISHED THAT THE PARTIES INTENDED TO ADMIT THE POSSIBILITY OF DENUNCIATION OR WITHDRAWAL; OR (B) A RIGHT OF DENUNCIATION OR WITHDRAWAL MAY BE IMPLIED BY THE NATURE OF THE TREATY.
2. A PARTY SHALL GIVE NOT LESS THAN TWELVE MONTHS' NOTICE OF ITS INTENTION TO DENOUNCE OR WITHDRAW FROM A TREATY UNDER PARAGRAPH 1."
"ARTICLE 57: SUSPENSION OF THE OPERATION OF A TREATY UNDER ITS PROVISIONS OR BY CONSENT OF THE PARTIES. THE OPERATION OF A TREATY IN REGARD TO ALL THE PARTIES OR TO A PARTICULAR PARTY MAY BE SUSPENDED: (A) IN CONFORMITY WITH PROVISIONS OF THE TREATY; OR (B) AT ANY TIME BY CONSENT OF ALL THE PARTIES AFTER CONSULTATION WITH THE OTHER CONTRACTING STATES."
SINCE TIAS 2719 DOES NOT CONTAIN A PROVISION FOR TERMINATION OR SUSPENSION, AND SINCE THE PARTIES DID NOT INTEND TO TERMINATE THE TAX EXEMPT STATUS OF U.S. FORCES WHILE U.S. FORCES REMAIN IN BELGIUM, NO TERMINATION OR SUSPENSION APPEARS POSSIBLE WITHOUT THE CONSENT OF THE U.S.G. EVEN IF SUCH AN INTENTION COULD BE FOUND, TWELVE MONTHS NOTICE WOULD BE REQUIRED UNDER THE STANDARD OF THE VIENNA CONVENTION ON THE LAW OF TREATIES. THE DEPARTMENT EMPHASIZES THAT EVEN THE MENTION OF TERMINATION OR SUSPENSION OF TIAS 2719 COULD HAVE FAR REACHING IMPACT ON USG-GOB RELATIONS. THUS, UNLESS GOB ADDRESSES THIS TOPIC, DEPARTMENT INSTRUCTS THAT THIS SUBJECT NOT BE RAISED.

10. THOUGH DEPARTMENT HOPES THAT GOB WILL BE PERSUADED BY FOREGOING ARGUMENTATION AND WILL GRANT USG COMPLETE EXEMPTION FROM TAXES IN QUESTION, DEPARTMENT RECOGNIZES, AS DOES PARAGRAPH 4 OF TIAS 2719, THAT FOR ADMINISTRATIVE REASONS COMPLETE EXEMPTION IS NOT ALWAYS POSSIBLE. THUS, IF COMPLETE EXEMPTION DOES NOT APPEAR ADMINISTRATIVELY FEASIBLE, DEPARTMENT HOPES THAT LEGAL AD-

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VISER FIELDS, GC/IA ALLEN, AND EMBASSY OFFICER CAN
ASCERTAIN DURING JULY 11 MEETING PRINCIPLES UPON WHICH
ADMINISTRATIVELY FEASIBLE TAX RELIEF CAN BE OBTAINED
WITHOUT RAISING POSSIBILITY OF SUSPENSION OR TERMINATION
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